NO. 62167-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PHOENIX DEVELOPMENT, INC., a Washington Corporation and G&S SUNDQUIST THIRD FAMILY LIMITED PARTNERSHIP, a Washington limited partnership,

Appellants,

v.

CITY OF WOODINVILLE, a Washington Municipal Corporation, and CONCERNED NEIGHBORS OF WELLINGTON, a Washington nonprofit corporation,

Respondents.

REPLY OF CONCERNED NEIGHBORS OF WELLINGTON TO *AMICUS CURIAE* BRIEF OF BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

J. Richard Aramburu, WSBA 466
Aramburu & Eustis LLP
720 Third Avenue, Suite 2112
Seattle WA 98104
206/625-9515
Attorneys for Respondent
Concerned Neighbors of
Wellington

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Statutes

Rules and Regulations

I. INTRODUCTION

Building Industry Association of Washington (BIAW) has been granted leave to file an *amicus curiae* brief in this appeal. This is the reply of respondent Concerned Neighbors of Wellington (CNW) to BIAW's brief.

BIAW raises primarily economic issues in its brief, asserting, though without any foundation in the record, that its members will be harmed because an adverse decision will "drive up the cost of land development." Brief at 4. BIAW argues that this is so because the city has failed to follow its own rules and ordinance, because it has not applied the Growth Management Act (GMA) and because it "succumbed" to community pressure. These assertions find no support in the record nor under the law. Accordingly, the arguments of the BIAW should be rejected and this Court should affirm the trial court's dismissal of the LUPA petition of Phoenix Development.

II. GMA IS NOT DIRECTLY APPLICABLE TO INDIVIDUAL LAND USE DECISIONS.

The pervasive theme of BIAW's brief is that the City decision to continue with R-1 zoning for the Phoenix properties is inconsistent with GMA. For example, BIAW argues that Phoenix's rezones are "in furtherance of the GMA's goals" and that approval

thereof "should be required to fulfill its obligations under GMA. . . ." Brief, p. 8. BIAW also "urges this court to look to the policies of the GMA for guidance in determining whether a 'need' has been met." Brief at 9. But recent caselaw clearly states "that a site specific rezone cannot be challenged for compliance with GMA." *Woods v. Kittitas County,* 162 Wn.2d, 597, 614, 174 P.3d 24 (2007). See also *Timberlake Christian Fellowship v. King County,* 114 Wn. App. 174, 182-183, 61 P.3d 332 (2002):

> The GMA does not have site-specific effect at the project level. Instead, it establishes a general framework in which local governments are required to plan in accordance with certain guidelines. See *Ass'n of Rural Residents v. Kitsap County*, 141 Wn. 2d 185, 188, 4 P.3d 115 (2000) (calling GMA "a comprehensive planning framework under which local governments are required to plan according to general mandates established by the Legislature.") (emphasis added).

BIAW also ignores the intent of the legislature which grants considerable deference to local governments, providing that the ultimate responsibility for compliance with GMA rests with local governments. As RCW 36.70A.3201 states:

> In amending RCW 36.70A.320(3) by section 20(3), chapter 429, Laws of 1997, the legislature intends that the boards apply a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and

> cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

The Court should reject the proposition that GMA goals and policies should be applied directly to these rezone proposals.

III. PREDICTABILITY FOR ALL INTERESTED PARTIES IS ASSURED BY THE COUNCIL'S DECISION IN THIS MATTER.

Another of the BIAW themes is that the Council's decision here "compromised predictability" which will "needlessly increase the cost of housing by driving up the cost of land development." Brief at 4. CNW understands that BIAW wants to maximize profits for its members. However, BIAW really wants to shift the burden for paying for development to local governments and existing taxpayers. That intention is readily apparent here.

One of the two central concerns of the Woodinville City Council was that the area of the proposed rezones did not have adequate public facilities services to support this development.

This lack of services includes substandard local access roads, inadequate arterial street connections, no transit service, lack of sidewalks and no park or recreation facilities within the area. These deficiencies, including citations to the record, are set forth at page 38-41 of CNW's Brief. These conclusions of the City Council were supported by extensive studies and reports prepared by CNW's consultants and members. For example, conclusions that local access and arterial streets were inadequate came from testimony of a licensed, professional engineer with 25 years in transportation engineering. See page 38 of CNW's brief.

In fact, the policy of assuring the availability of adequate public services has been a part of Woodinville ordinances since 1997 when the current city codes were adopted. See City of Woodinville Zoning Code Section 21.04,080(2) stating that R-4 zoning is appropriate only on urban lands "served at the time of development by adequate public sewers, water supply, roads and other needed public facilities and services; . . . " The zoning ordinance is consistent with the City's comprehensive plan which encouraged development in areas "with the capacity to absorb development" and where public services and facilities (such as roads and parks) "can be cost effectively provided, . . ." See

detailed discussion at page 44 of CNW's brief. Both the City's comprehensive plan and zoning ordinance are entirely consistent with GMA's stated hierarchy of development:

> (3) Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas.

RCW 36.70A.110.

In any event, it seems unlikely that reverting to GMA's more vague and nebulous goals and policies rather than the comprehensive plan and zoning code will create more "predictability."

BIAW's position appears to be that development should proceed, even when the public facilities and services are inadequate or unavailable, under the proposition that someone else (here the taxpayers of the City) should pick up the tab.

IV. THE WOODINVILLE CITY COUNCIL DECIDED THIS MATTER ON SUBSTANTIAL SUPPORTING EVIDENCE, NOT BECAUSE OF COMMUNITY PRESSURE; IN ANY EVENT CITIZEN PARTICIPATION IS GUARANTEED BY THE GMA AND WOODINVILLE ORDINANCES.

At page 8 of its brief, BIAW asserts that:

> The City should not be allowed to succumb to neighborhood opposition, but should be required to fulfill its obligation under GMA and its own codes and approve the rezone.

No citation is provided for this sweeping accusation, either from the record or from the existing parties' briefs. BIAW makes no allegations that there was some kind of improper contact or communication between the City Council and members of the public.

Indeed, there is no proof of any kind or type that City Council "succumbed" to opposition from the neighborhood. In fact, the Woodinville codes provide for public participation throughout the rezone review process. This is completely consistent with GMA policies:

> (11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

RCW 36.70A.020. Of course it is apparent that, from time to time, public comments may be accepted by the decision makers. Under Washington law:

> the law expressly gives the public a right to be heard-as distinguished from open sessions of the Congress or state legislatures or lesser legislative bodies which, although conducting their session in public, need not as a matter of law allow public participation-the public hearing must, to be valid,

> meet the test of fundamental fairness, for the right to be heard imports a reasonable expectation of being heeded.

Smith v. Skagit County, 75 Wn. 2d 715, 740, 453 P.2d 832, 846 (1969).

What is clear from the record is that Phoenix's rezone did not meet the criteria for a rezone from R-1 to R-4.

There is little doubt that the land use process would be faster and more "predictable" to development interests if public participation was either eliminated or simply kept on as "window dressing." However, Washington law correctly encourages, not stifles, public participation.

V. CONTRARY TO BIAW'S UNSUPPORTED IMAGININGS, THE CITY IS MEETING ITS GMA REQUIRED GROWTH MANDATES.

BIAW asserts at page 7 that, without the rezoning requested by the applicant here, "[m]eeting GMA-mandated density goals within these parameters is nigh impossible." This sweeping peroration is unsupported by either references to the record or to any of the parties' briefs; no wonder, the statement is not legally or factually supported.

In fact, the City of Woodinville is meeting its housing goals. This was stated by the City Planning Director, Ray Sturtz, at the

hearing before the Hearing Examiner:

> The bottom line is the City does not need any residential rezones to meet its GMA obligation or comply with its Comprehensive Plan and meet the goals and visions stated therein.

Transcript, March 14, 2007 at page 38. Indeed, the record here shows that Woodinville has an excess of 477 units over its required density through its the 20 year planning period. This evidence is discussed in detail at pages 20-21 of CNW's opening brief.

In short, BIAW is wrong; the evidence demonstrates that the City is meeting and exceeding the housing goals mandated by GMA. It is doing so consistent with its comprehensive plan and GMA by focusing new development in those areas where adequate streets, park facilities and mass transit are available, not, as in the case of Phoenix's rezone application, where significant public expenditure is required to bring these facilities and services up to minimum requirements.

VI. CONCLUSION.

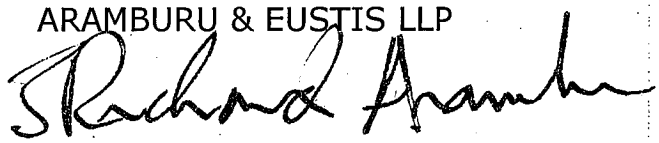
There is no question that the land development process would be more "predictable" for BIAW's members if this Court were to do away with long standing procedures and criteria for land development. That certainly would be the case if public participation was eliminated or ignored and the local government

had to bear responsibility to upgrade inadequate public services and facilities. However, established Washington law does not support BIAW's objectives, and as a matter of public policy, should not.

The trial court and Woodinville City Council's decisions should be affirmed.

DATED this 6th day of April 2009.

Respectfully submitted,
ARAMBURU & EUSTIS LLP



J. Richard Aramburu, WSBA 466
Attorneys for Concerned
Neighbors of Wellington

CERTIFICATE OF SERVICE

The undersigned declares that she is a citizen of the United States, over the age of 18 years and not a party to the above-entitled action. On April 5, 2009 I caused Reply of Concerned Neighbors of Wellington to *Amicus Curiae* Brief of Building Industry Association of Washington to be served on counsel herein as follows:

By e-mail, followed by next day messenger:

Michael Walter
Keating Bucklin
McCormack Inc
800 Fifth Avenue, Suite 4141
Seattle WA 98104-3175
mwalter@KBMlawyers.com

John M. Groen
Groen Stephens & Klinge
11100 NE 8th Street, # 750
Bellevue WA 98004
groen@gsklegal.pro

G. Richard Hill
McCullough Hill P.S.
701 Fifth Avenue, Suite 7220
Seattle WA 98104
rich@mhseattle.com

Greg Rubstello
Ogden Murphy Wallace
1601 5th Avenue, Suite 2100
Seattle WA 98101
grubstello@omwlaw.com

By e-mail and first class mail:
Timothy M.Harris
Building Industry Association of Washington
111 - 21st Avenue SW
Olympia WA 98507
timothyh@biaw.com

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true to the best of my knowledge and belief.

DATED at Seattle, ~~WA this~~ 6th day of April 2009.

Patricia Young